Joan Marsh
Director
Federal Government Affairs

Suite 1000
1120 20th Street NW
Washington DC 20036
202 457 3120
FAX 202 457 3110

October 28, 2002

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., Docket CC-99-272

Dear Ms. Dortch:

On behalf of AT&T Corp., the attached letter addressed to Maureen Del Duca of the FCC's Enforcement Bureau was delivered to all addressees today.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the proceeding.

Sincerely,

Joan Marsh

Aryeh S. Friedman
Senior Attorney

Room 3A231
900 Route 202/206 North
Bedminster, NJ 07921
Phone: 908 532-1831
Fax: 908 532-1281
EMail: friedman@att.com

October 28, 2002

VIA E-MAIL

Maureen Del Duca
Deputy Chief, Investigations and Hearings Division
FCC Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc. and U S West Inc., CC Docket No. 99-272

Dear Maureen:

In a filing recently made to the Securities and Exchange Commission ("SEC"), Qwest effectively admitted that the contractual arrangements at issue in this proceeding were improperly accounted for as "sales" and should have been accounted for as "service" agreements. This admission demonstrates, beyond the shadow of a doubt, that Qwest willfully and repeatedly violated both the *Qwest Merger Orders*[1] and Section 271. As in

[1] Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376 (March 10, 2000) ("*March 10 Merger Order*"); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a*

the Commission's recent decision *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*[2] the Commission should delay no longer and should instead penalize Qwest as requested in *AT&T's May 2, 2002 Comments*.[3]

1. Qwest has admitted that the contractual arrangements at issue in this proceeding were improperly accounted for as "sales" and should have been accounted for as service agreements:

Qwest, in its September 23, 2002 Form 8K filed with the SEC,[4] disclosed that "in connection with the company's restatement of its financial statements for 2000 and 2001, the approximately $531 million in revenue previously recognized from the[] *sales* of optical capacity *assets* for *cash*"[5] – which would include the optical capacity IRUs at issue

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Submarine Cable Landing License, 15 FCC Rcd 11909 (June 26, 2000) ("*June 26 Merger Order*") (collectively the "*Qwest Merger Orders*").

2 Forfeiture Order, File No. EB-01-1H-0030 (rel. Oct. 9, 2002), (hereinafter the "*SBC Forfeiture Order*").

3 *AT&T's May 2, 2002 Comments* at 32-33, requesting that: (a) Qwest should refund to customers any revenues associated with the unlawful transactions and be required to send a letter to those customers noting that Qwest violated Section 27; (b) Qwest should cease using lit fiber Capacity IRUs (and/or misdesignating such traffic as "corporate communications traffic) to circumvent its obligations under the *Qwest Merger Orders* and Section 271; (c) the Commission should impose the maximum fine for each violation (and there are separate violations for each transaction involved); and (d) the Commission should advise impacted states about the scope and nature of the Commission's investigation. AT&T further requested that the Commission should open an investigation into the truthfulness of statements made by Qwest (as well as material omissions) during the merger proceedings.

4 *See,* http://www.sec.gov/Archives/edgar/data/1037949/000101905602000675/ex99_1.txt and http://www.sec.gov/Archives/edgar/data/1037949/000101905602000675/0001019056-02-000675-index.htm; *see also*, COMMUNICATIONS DAILY'S WASHINGTON TELECOM NEWSWIRE October 1, 2002, 5:45 p.m. ET (similar testimony by Qwest's Chief Financial Officer Oren Schaffer before the House Commerce Oversight Subcommittee).

5 The reference to "cash" is apparently to distinguish "non-swap" from "swap" transactions; the latter may raise additional accounting issues.

in this proceeding – "may require adjustment" – that is, as disclosed in a previous Qwest SEC filing, will be reclassified from "sales" to "operating leases or services contracts."[6]

This admission relates directly to this proceeding because Qwest's key defense of its lit fiber capacity IRUs at issue here has been that they were "property transfers" or "conveyance" of "facilities" and not operating leases or services contracts.[7] Qwest's admission now demonstrates the absence of any basis for this defense; that is, its prior assertions that these lit fiber capacity IRUs were "property transfers" is simply false.

2. *This admission demonstrates that Qwest "willfully and repeatedly" and substantially violated both the June 26 Merger Order and Section 271.*

Qwest's admission concedes substantial non-compliance with a clear and unambiguous merger condition which was designed to insure compliance with Section 271. Specifically, Qwest agreed, as a condition for obtaining the Commission's approval of its merger with US West, that it would "sell to Touch America all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a U S WEST LATA boundary, *and will receive no revenues from these in-region interLATA services*" (emphasis added).[8] This language couldn't be clearer – Qwest could receive *no revenues* from retail and wholesale private line voice and data services where a circuit provided to a customer crosses a U S WEST LATA boundary. Yet that is precisely what

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6 *See,* Qwest's press release on July 28, 2002, http://biz.yahoo.com/prnews/020728/lasu003_1.html, included in its Form 10K Annual Report for 2001 filing it made the next day, http://www.sec.gov/Archives/edgar/data/1037949/000101905602000537/0001019056-02-000537-index.htm (Qwest states that, in some instances, the "optical capacity asset sales" should have been "instead treated as operating leases or services contracts.").

7 Letter from Arthur Anderson LLP to Ms. Dorothy Atwood, Chief, Common Carrier Bureau, dated June 6, 2001, Findings 2 and 7; *See also, Touch America, Inc. v. Qwest, Communications International, Inc.,* File No. EB-02-MD-003, Amended Answer of Defendants Qwest Communications International, Inc., Qwest Corporation, and Qwest Communications Corporation ("Qwest"), ¶¶ 1, 84, 88; *Qwest's August 9, 2002 Brief* at 2-3 and *Qwest June 28 2002 Filing* at 3.

Qwest now admits it has done, receiving revenue from the provisioning of in-region interLATA services (not the sale of assets) which Qwest has separately calculated as approximately $261 million since July 1, 2000.[9] That is, Qwest received substantial in-region interLATA revenue in violation of the express and unambiguous terms of this condition and in violation of Section 271.

3. The Commission should delay no longer and should instead impose the penalties requested by AT&T.

Under Section 503(b)(1) of the Communications Act, any person that "willfully or repeatedly" fails to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument issued by the Commission shall be liable to the United States for a forfeiture penalty. This would include violations of merger order conditions such as the condition cited above.[10]

Qwest has itself asserted that its decision to sell (and receive in-region interLATA revenues from) these "lit fiber capacity IRUs" that are now conceded to be service agreements in violation of the merger conditions, "was conscious and deliberate,"[11] that is, it acted "willfully" within the meaning of Section 503(b)(2)(B) of the Communications Act.[12] Moreover, it did so "repeatedly" not only in that it entered into sham "IRUs" with at

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8 This was a condition to the Commission's approval of Qwest's divestiture to Touch America, *June 26 Merger Order* at ¶ 13 (further providing that this would result in its compliance with the requirements of Section 271) *see also, id.*, ¶¶ 8-9, which was, in turn, a condition to the Commission's approval of Qwest's merger with US West, *March 10 Merger Order* ¶¶ 64, 67 and 70.

9 Qwest's Answer to the *IRU formal complaint* ¶ 175.

10 *SBC Forfeiture Order.*

11 Qwest's Answer to the *IRU formal complaint,* ¶ 94.

12 *SBC Forfeiture Order*, ¶ 21("the word 'willfully,' as employed in section 503(b) of the Act does not require a demonstration that a party knew it was acting unlawfully, but only that it knew it was committing the acts in question consciously and deliberately, and that the acts were not accidental" citations omitted).

least seven private and numerous governmental entities,[13] but that it did so in multiple in-region states.[14] And as shown above, Qwest's failure to comply was "substantial."

Accordingly, we anticipate that the Commission will proceed with all due haste to impose the penalties previously requested by AT&T.

Sincerely,

/s/

Aryeh Friedman

cc: Mark Stone
Anthony Dale
Jonathan S. Marashlian
John C. Keeney

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13 *AT&T's May 2, 2002 Comments* at 10-11 and notes 37-38; at least eight more unaffiliated private entities were provided interLATA service through the guise of "corporate communications." *Id.* at 24.

14 *SBC Forfeiture Order*, ¶ 21.